Court of Appeals (Pet. App. p. 13a). Mr. Howard also admittedly carried his argument for the Judge into areas where he was speaking for Firestone (Supp. App. p. 6).

(e) General does not know and cannot find out all that may have happened in relation to the *ex parte* collaboration between Mr. Howard and Judge Watkins. Before Judge Watkins' statement of December 16, 1965, in response to a question from counsel for General, General had no operative knowledge of the *ex parte* conferences. *In re Murchison*, 349 U.S. 133 (1955) is directly in point.

(f) Mr. Howard prepared the Judge's response to the transfer mandamus and then, as counsel for Firestone, adopted the "Judge's" response as part of Firestone's intervening brief (Pet., p. 7).

Petitioner Does Not Request Retroactive Application.

Firestone refers to General's petition as a request to have the Court of Appeals' decision applied retroactively. This is a false issue. The petition is *not* a request for retroactive application. This case has not gone to final judgment; it is still at trial. Even if the Court of Appeals' decision is to be applied *in futuro*, it should apply to the future trial of this case. Petitioner is asking only that the *normal* procedure be followed of applying any new rule to the case in which it is promulgated.

In *Rapp* v. *Van Dusen*, 350 F. 2d 806, 814 (3rd Cir. 1965) the Court said, "There is no reason why the beneficial purpose of this procedure should not extend to the present cases." This language was quoted by the Fourth Circuit, but that Court did not extend relief to General and gave *no* reasons for not doing so.

Disqualification Would Not Result in Loss of Testimony Already Taken.

Firestone's repeated argument concerning the amount of trial time which would be wasted and "key witnesses" who would be lost if the District Judge were disqualified are attempts to raise other false issues. Firestone says that trial is " 'hopefully' nearing completion." (Intervenor's Brief, p. 2). General is not at all sure the trial is "nearing completion," but significantly, the testimony of the "key witnesses" already taken would *not* be lost and would be usable at another trial.

Insofar as the disqualification of Judge Watkins would delay the trial, this case is no different than any other proceeding in which trial is delayed, or, in the case of reversal, tried anew. The pre-trial in *Rapp* v. *Van Dusen, supra,* continued at least three years before Judge Van Dusen was disqualified.

CONCLUSION.

In summary, General contends that for the reasons set out in its main brief, this petition should be granted and the case either summarily remanded for disqualification of the District Judge, or remanded for disqualification pursuant to 28 U. S. C. § 455, after hearing.

Respectfully submitted,

THE GENERAL TIRE & RUBBER COMPANY.

CHARLES J. MERRIAM,
Thirty West Monroe Street,
Chicago, Illinois 60603,

NORMAN P. RAMSEY,
Suite 1750, 10 Light Street,
Baltimore, Maryland 21202,
Attorneys for Petitioner.

FRANK J. EARNHEART,
1708 Englewood Avenue,
Akron, Ohio 44309,
Of Counsel.